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Supreme Court of the United States

OCTOBER TERM, 1935.

ESSEX RAZOR BLADE CORPORATION, Petitioner, vs. GILLETTE SAFETY RAZOR COMPANY, Respondent.	No. 879

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This is an ordinary patent case in which respondent, assignee of the Gaisman patent No. 1,633,739 (R. 120), brought suit for infringement of claims 1 and 2 thereof involving a safety razor blade. The Circuit Court of Appeals for the Third Circuit in a well reasoned opinion held the patent valid and infringed (R. 230).

As pointed out in the opinion below, the invention increases by as much as 40% the accuracy with which the blade is positioned in the razor (R. 240, 241), thus, for the first time in the art, producing "a safe, non-face cutting Gillette razor" (R. 244) which the court referred to as a device "of high merit, an important advance, and one worthy of patent protection" (R. 238, fol. 241).[1]

The District Court found, during the trial, that petitioner's blade "is a Chinese imitation" (R. 54) and "I

[1] Gaisman introduced a new principle in the safety razor art by which he caused the blade to perform an entirely new function, namely that of retaining the guard and cap in accurate relation one to another and to the blade. This new principle is not disclosed anywhere in the prior art. The blade thus became the active element or key by which

have made up my mind there has been infringement" (R. 80). The statement in the petition for *certiorari* (p. 4) that "The issue of infringement was not passed upon by the District Court" is, therefore, incorrect. The District Court further remarked that the "equities are all" on the side of the respondent (R. 54). It appears that the officers of the petitioner were formerly officers of the respondent company (R. 244-245).

The Circuit Court of Appeals, concurring in the findings of the District Court, found with respect to infringement (R. 244):

> "That the defendant's blade is substantially a copy of Gaisman's device is clear."

The petition for certiorari does not assert that the case involves any important or novel question of law, or that there is any conflict of decisions upon the issue of the validity of the Gaisman patent. The sole ground stated in the petition (p. 5) as the reason for the granting of the writ is the contention that, in holding claims 1 and 2 of the Gaisman patent infringed by petitioner's blade the Court below has rendered a decision, respecting the *scope* of the claims, in conflict with a decision of the Circuit Court of Appeals for the Second Circuit in *Gillette Safety Razor Co.* v. *Hawley Hardware Co.*, 64 F. (2d) 10 (cert. den. 290 U. S. 649, Oct. 9, 1933).

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the positioning of all three parts of the razor was accomplished. As stated by the court below (R. 235):

> "We here note, as above stated, that in this Gillette type of razor Gaisman sought to improve, the blade was a passive, non-controlling and non-operating element in fixing, determining or maintaining the relation of the backing member and the guard member and *that his invention was in now making the blade the dominating and exclusive factor which positioned, maintained and kept in proper cutting position, first, the backing member; second, the guard member; and third, the proper cutting edge of the blade itself.*"

The District Court, in that case in the Second Circuit, held (60 F. (2d) 1019; Appendix hereto) that claim 1, and claim 3 not here in suit, of the Gaisman patent were valid and infringed. The Court of Appeals reversed solely on the ground of non-infringement without disturbing in any way the District Court's conclusion that the patent is valid.[2] The Court of Appeals held that the Clark or Hawley blade there involved "does not infringe the construction or perform the functions specified in claim 1" (64 F. (2d) 10, 11; Appendix to Petition, p. iv).[3]

The Court of Appeals for the Second Circuit, in reaching that conclusion, misunderstood Gaisman's invention and also his claim 1. The bases of the court's misunderstanding are concisely stated and explained in the petition for writ of certiorari (pp. 3-5) and supporting brief (pp. 9-16)[4] in that case and, therefore, are not repeated here.

While we are convinced that the decision of the Circuit Court of Appeals for the Third Circuit, in the instant case, is correct and would be affirmed by this Court if the petition were granted, we feel that we should direct the attention of the Court to the following:

1. The Circuit Court of Appeals for the Third Circuit, as well as the District Court there, held that petitioner's blade is not only clearly an infringement of the Gaisman patent, but is substantially a copy of the Gaisman blade.

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[2] The Supreme Court of Canada did not hold the corresponding Canadian patent invalid (Appendix to Petition, p. v), and in refusing to follow the decision of the District Court in the *Hawley* case on the question of infringement, stated that "the law to be applied" in the two countries was "not the same" (Appendix to Petition, p. xviii).

[3] The Gaisman blade, petitioner's blade, and the Clark or Hawley blade are illustrated in the frontispiece of the petition for certiorari.

[4] Printed in the appendix to the petition in the present case.

The petition for certiorari discloses no ground for assailing the correctness of that finding and makes no attempt whatever to establish that "clear error" which must be established before this Court will refuse to accept findings in which the two lower Federal courts have concurred.[5]

2. Petitioner devoted only a few lines (less than half a page) to the alleged defense of non-infringement in its brief in the court below, and did not discuss the findings of the Court of Appeals in the *Hawley* case or make any attempt to justify the grounds upon which that decision was based. *Petitioner's conduct confirms the fact that there is no defense of non-infringement.*

3. What, then, does petitioner hope to gain from this petition?

Apparently, petitioner's real reasons for filing the petition are—

(a) Both courts below having decided that petitioner's blade is a copy or substantially a copy of Gaisman's blade, it seems to us that no question of the *scope* of claims 1 and 2 is or could be involved in the present case. What petitioner is asking the Court to do is to pass upon the question of infringement in the *Hawley* case (which cannot now be brought here because the time for bringing it here has long since expired) and to decide that the claims are not of sufficient scope to cover that blade. This is in reality a request for an advisory opinion from this Court as to whether defendant would be free to make the Hawley blade not here involved. As can readily be seen from an inspection of the drawings in the frontispiece of the petition, petitioner's blade is not identical with the Clark or Hawley blade. We urged and still believe that the latter blade, also, embodies the invention

[5] *Bodkin* v. *Edwards*, 255 U. S. 221, 223; *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 558; *Page* v. *Arkansas Gas Corp.*, 286 U. S. 269, 271.

of the patent in suit but the question whether the claims are of sufficient *scope* to cover that blade is not now before this Court.

(b) That the patent would be held not infringed if the writ were granted does not appear to be hoped for, but, rather, petitioner desires another hearing on the question of validity, as to which no conflict exists and which affords no basis for the grant of the writ.[6] Petitioner has not included invalidity as a ground for granting the writ, but has shown such a holding to be its main objective by including that alleged defense among the matters which it says it "intends to urge" if the petition is granted (Brief pp. 7, 8).[7]

It seems to us that petitioner misconceives the purpose of the certiorari jurisdiction of this Court.

Respectfully submitted,

CHARLES NEAVE,
Counsel for Respondent.

HENRY R. ASHTON,
Of Counsel.

April, 1936.

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[6] *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 388, 392, 393; *Magnum Co.* v. *Coty*, 262 U. S. 159, 163; *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314, 317, 319, 320.

[7] As stated in *Gunning* v. *Cooley*, 281 U. S. 90, 98: "Defendant seeks reversal on a number of grounds that were not mentioned in his petition for the writ. But this court is not called on to consider any question not raised by the petition. *Webster Co.* v. *Splitdorf Co.*, 264 U. S. 463, 464." *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242; *Steele* v. *Drummond*, 275 U. S. 199, 203; *Sanitary Refrigerator Company* v. *Winters*, 280 U. S. 30, 34; *Page* v. *Arkansas Gas Corporation*, 286 U. S. 269, 270, 271.